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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ORLANDO GENE TSO,

Defendant and Appellant.

A134485

(Sonoma County Super. Ct. No. SCR-579378)

Appellant Orlando Gene Tso challenges a probation condition precluding his use and possession of peyote and medical marijuana. As we conclude appellant seeks to appeal from a nonappealable order, the appeal is dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

On March 8, 2010, the Sonoma County District Attorney filed a complaint against appellant alleging a felony count of unlawfully carrying a concealed dirk or dagger (Pen. Code, former § 12020, subd. (a)(4); now § 21310); and misdemeanor counts of resisting arrest (§ 148, subd. (a)(1)) and public intoxication (§ 647, subd. (f)). On June 17, appellant entered a plea of no contest to the felony count, and the remaining counts were dismissed.

¹ All undesignated section references are to the Penal Code.

On July 15, 2010, the court suspended imposition of sentence and placed appellant on three years' supervised probation, subject to various terms and conditions, including completion of a residential drug rehabilitation program, community service, chemical testing, and a condition precluding use and possession of alcoholic beverages and controlled substances without a valid prescription.

Appellant's probation was summarily revoked on November 19, 2010, for failing to complete residential treatment. He had been terminated from his treatment program and referred for outpatient services "due to his inability to pay rent and his manipulative behaviors." At a January 13, 2011 hearing, the court reinstated appellant's probation and modified the terms and conditions to require additional community service and completion of a one-year aftercare program in lieu of residential treatment.

On October 10, 2011, an officer responding to a 911 call found appellant's former girlfriend crying in a vehicle with her infant child as appellant danced in circles in the garage, waving a feather and playing a homemade flute. He displayed erratic behavior, yelled at his girlfriend, and refused to comply with the officer's directives, so he was taken into custody. (§ 148, subd. (a)(1) [obstructing a peace officer in the discharge of his duty]; § 1203.2 [probation revocation upon rearrest].) He admitted he had consumed a spoonful of peyote immediately before his arrest. Shortly thereafter, applellant's probation was once again summarily revoked. At an October 17 hearing, appellant admitted violating his probation by failing to abstain from the use of controlled substances, including peyote, and interfering with an officer in the line of duty. The probation officer said appellant had made progress in some areas but continued to use medical marijuana and peyote. The probation officer informed the court that appellant had stated he "is now ready to abstain from marijuana as well as peyote." The court found a probation violation and revoked appellant's probation, but reinstated probation on the same terms and conditions and imposed an additional condition requiring appellant to abstain from medical marijuana.

On November 8, 2011, appellant's counsel set the case for hearing on a motion to modify appellant's probation to permit his use of marijuana and peyote in Native

American rituals. (§ 1203.3, subd. (a).) On November 18, before the motion was heard, the court summarily revoked appellant's probation for failure to abstain from marijuana. Appellant had tested positive for THC (tetrahydrocannabinol) on October 17, November 7, and November 15. At a November 18 hearing, appellant denied the alleged probation violation, maintaining he was using marijuana consistent with his spiritual beliefs. The court set a probation violation hearing for December 22.

At the December 22, 2011 hearing, the parties stipulated that peyote and marijuana are controlled substances. Appellant testified as follows: He is a member of the Four Corners Navajo Nation and belongs to the Native American church, which has spiritual laws requiring the use of peyote. Peyote is "a sacrament" during worship and is considered "medicine"; it helps the tribe maintain serenity, clarity and a strong mind, and is used to "stay sober[,] . . . to get out of hardships, and [for] health issues." One-half to two-thirds of the tribe uses peyote as a sacrament; other tribe members do not need it because they are "healthy" and "complete." Marijuana is not associated with the Native American church. Some tribe members use marijuana medicinally; others do not use it at all. Appellant is a "bona fide medicine man" and can administer medicine to himself.

Appellant offered into evidence his "215 card;"² the card was a therapeutic cannabis recommendation prepared by Hanya Barth, M.D., of Compassionate Health Options, indicating appellant had been examined on February 15, 2011, and would benefit from the use of medical cannabis. The prosecutor stipulated the recommendation was valid. The recommendation provided diagnosis codes of 780.52 and 309.81, which appear to correspond to diagnoses of insomnia and posttraumatic stress disorder (PTSD).³

² A "215 card" refers to the government card issued under the Compassionate Use Act of 1996. (Health & Saf. Code, § 11362.5, also known as Prop. 215.)

³ Appellant did not offer evidence regarding the meaning of the codes. The probation department's presentence report for the July 2010 hearing indicates that appellant had obtained a medical marijuana recommendation seven or eight years earlier and used marijuana to treat PTSD and for pain management. In a June 2010 letter to the court, appellant's ex-girlfriend stated his service during the Gulf War "left him with behaviors"

The court asked the parties to submit briefing and set the matter for hearing in January 2012.

On January 25, 2012, the court found no probation violation, citing a lack of evidence, and reinstated appellant's probation with all terms and conditions to remain in effect. The court denied appellant's motion to modify the terms and conditions of probation to allow his use and possession of peyote, stating: "[Y]ou agreed, at the time you were placed on probation, to these terms and conditions of probation. They were set forth because of your history of substance abuse. And that history is lengthy." The court said appellant's "status as a probationer restricts his constitutional rights . . . and allows me to make a decision whether these probation terms are consistent with public safety and . . . your own health and safety. And I find that those terms are consistent with those two items." The court further stated it had found a compelling interest that allowed it to restrict appellant's use of peyote and its findings were the same as to appellant's use of marijuana.

Appellant filed a timely appeal from the trial court's order, contending the prohibition of medical marijuana was unreasonable, and the prohibition of peyote violated his fundamental religious rights and was not narrowly tailored to protect a compelling state interest.

DISCUSSION

We do not reach the merits of appellant's challenge to his probation conditions, as he did not appeal from the order initially imposing them, which was the order granting probation. "An order granting probation . . . is an appealable order. [Citations.]" (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.) "In general, an appealable order that is not appealed becomes final and binding and may not subsequently be attacked on an appeal from a later appealable order or judgment. [Citations.] Thus, a defendant who elects not to appeal an order granting or modifying probation cannot raise

^{. . .} typical of those who experience traumas," including difficulty sleeping and controlling his anger.

claims of error with respect to the grant or modification of probation in a later appeal from a judgment following revocation of probation." (*Ibid.*) The denial of a motion seeking modification of probation terms in the original plea agreement is therefore not appealable.⁴ (See *People v. Djekich* (1991) 229 Cal.App.3d 1213, 1219 ["Because the order granting probation was appealable, [the defendant's] failure timely to do so precludes this belated attempt to appeal from an order denying modification. To hold otherwise would condone extending the jurisdictional time limit for filing appeals through bootstrapping. [Citation.]"].)

The court first imposed the probation condition at issue here, which precludes appellant's use and possession of controlled substances without a valid prescription, in its July 2010 order granting probation. At the time of that order, appellant had a medical marijuana recommendation and had regularly used peyote for spiritual purposes since he was 10 years old; he later conceded marijuana and peyote were controlled substances. Yet he did not appeal from the order granting probation, and did not challenge the probation condition until almost 16 months later. The July order became final in September 2010, when the statutory period for appeal expired. Appellant may not now challenge the terms and conditions imposed in that order in the guise of an appeal from an order denying his motion to modify probation. A party may not use a motion to modify probation to resurrect an issue for appeal when the time for appeal has passed.

Section 1237 allows an appeal "[f]rom any order made after judgment, affecting the substantial rights of the party" (*id.*, subd. (b)), and states that an order granting probation "shall be deemed to be a final judgment" (*id.*, subd. (a)). Although some orders concerning modification of probation may be appealable as orders after judgment affecting the substantial rights of the defendant, a defendant's " '[s]ubstantial rights' . . .

^{4 &}quot;A change in circumstances is required before a court has jurisdiction to extend or otherwise modify probation." (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095.) "... 'An order modifying the terms of probation *based upon the same facts* as the original order granting probation is in excess of jurisdiction of the court, for the reason that there is no factual basis to support it.' [Citation.]" (*Ibid.*)

are not affected when [his] objections concern matters that could have been reviewed on timely appeal from the judgment. [Citations.]" (*People v. Howerton* (1953) 40 Cal.2d 217, 220.)

To the extent the original probation condition, which prohibits use or possession of controlled substances *without a valid prescription*, may be construed to allow the use and possession of marijuana when a defendant has obtained a medical marijuana recommendation, appellant also failed to appeal from the trial court's October 17, 2011 order modifying probation, which imposed an additional condition specifically precluding his use and possession of medical marijuana.⁵

DISPOSITION

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| The | appeal | 18 | dis | miss | ed. |
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| | SIMONS, Acting P.J. | |
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| We concur. | | |
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| NEEDHAM, J. | | |
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| BRUINIERS, J. | - | |
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⁵ The instant appeal was filed after the statutory period for appeal from the court's October 17, 2011 order modifying probation had expired.